STATE OF MICHIGAN

COURT OF APPEALS

NADA RANGEL,

Plaintiff-Appellee,

v

JOSE JESUS RANGEL,

Defendant-Appellant.

UNPUBLISHED
January 24, 2003

No. 233004
Saginaw Circuit Court
LC No. 96-014435-DM

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant appeals by right from a property settlement granting plaintiff $2,000 a month in permanent alimony. The judgment of divorce also granted plaintiff fifty percent of defendant's pension. We affirm.

In an earlier appeal, we remanded this case to the trial court, finding that that the trial court erroneously focused on the issue of fault in its property division and failed to make specific findings regarding the property division factors enumerated in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). *Rangel v Rangel*, unpublished opinion per curiam of the Court of Appeals, issued December 17, 1999 (Docket No. 212065), slip op pp 3-4. On remand, the trial court made specific findings regarding the *Sparks* factors, and granted plaintiff permanent alimony of $2,000 a month, constituting 50.5 percent of defendant's pension.

Defendant was hired by the Saginaw Police Department four years before the parties married, and he worked there throughout most of the marriage. Suffering from an emotional trauma, defendant applied for disability benefits in April 1996. The city, in computing an employee's disability, counts the employee's number of years and months of regular service and then adds additional years to reach the employee's fifty-fifth birthday. The city credited defendant with serving eighteen years and three months, and he was credited an additional six years and four months to reach his fifty-fifth birthday. Because defendant had served in the military, he was allowed to purchase an additional three years and ten months, which he purchased during the marriage with marital funds. Thus, for determining his disability payments, in total, defendant was credited with twenty-eight years and five months.

Once on disability, defendant was subject to annual medical examinations for the first five years to determine whether he was capable of returning to work. If deemed capable, he would lose the pension years credited to him but not served, and the military time he purchased

would not be counted until he retired with at least twenty years of regular service. However, if he is still on disability at age fifty-five, his pension would revert to regular service for life. While on disability, defendant is allowed to earn a certain income, based on both his pension and the base pay rate for the position held at the time of retirement. However, because he is receiving more than the base pay rate, any outside income defendant earns will result in a "dollar for dollar reduction in his pension." After defendant reaches age fifty-five, his disability income will switch to a regular service pension, and there will no longer be an outside income restriction.

The trial court's judgment of divorce provided:

> [o]ne-half of Defendant's pension except the military years and any extra years because of disability will be credited to the Plaintiff's share. The Plaintiff will begin collecting her payments when the Defendant retires or is considered permanently disabled by his employer subject to a [sic] Eligible Domestic Relations Order (EDRO).

On initial appeal, we held that the proper reading of the language provides that plaintiff receive fifty percent of defendant's pension, except for that part attributable to the military service time credit and the disability service time add-on, from which plaintiff receives nothing. *Rangel*, *supra* slip op at 2. Also, we remanded the case to the trial court, instructing the court to make a clear record of the city's position on this matter in order to facilitate any possible further review. *Id*. at 4.

On remand, the trial court considered each of the *Sparks* factors, and awarded plaintiff permanent alimony in the amount of $2,000 a month. It is from this order that defendant now appeals.

We review property dispositions and alimony awards de novo. *Wilson v Wilson*, 179 Mich App 519, 522-523; 446 NW2d 496 (1989). However, we will not substitute our judgment for that of the trial court unless we are convinced that either an abuse of discretion has occurred or we would have reached a different result. *Id*. at 523. In a divorce case, the trial court's dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm conviction that the division was unfair or inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

In a divorce proceeding, the trial court's goal in distributing marital assets is to reach an equitable distribution of property in light of all the circumstances. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). Generally, only marital assets are subject to property division between the parties; thus, the parties' separate assets may not be invaded. *Id*. at 183. Assets earned by the parties during the marriage are considered part of the marital estate. *Id*. The appreciation of a premarital asset during the marriage is usually subject to division unless the appreciation was passive. *Id*.

Defendant first argues that generally, a non-pensioned party has no interest in the portions of pension that were earned before the marriage or after the marriage, and the court may not distribute those portions of the pension because they are separate assets. We find that this argument fails. Defendant relies on *McDougal v McDougal*, 451 Mich 80, 90; 545 NW2d 357

(1996), to support his position that the premarital and post-marital contributions to the pension should be excluded from the marital assets.

The instant case is distinguishable from *McDougal*. In *McDougal, supra* at 81-82, the plaintiff received a large cash award from the income produced by inventions patented before the marriage but enforced during the marriage. The Supreme Court's decision not to grant the plaintiff any future rights in the patents themselves was based on an equitable distribution, and the Court determined that because the plaintiff received a substantial cash award, there was no need to invade the defendant's separate property – the future rights in the patents. *Id*. at 90-91. In the instant case, the record does not indicate that the parties have substantial marital assets to divide – the most substantial asset involved appears to be defendant's pension.

Under MCL 552.18(1), any vested rights in any "pension, annuity, or retirement benefits, or accumulated contributions in any pension, annuity, or retirement system" payable to a party from service accrued during the marriage are part of the marital estate. Although MCL 552.18(1) provides that pension contributions made during the marriage must be considered, it does not expressly provide that contributions made before or after the marriage may not be considered. "That is, the language is inclusive and mandates what must be taken into account, but does not exclude consideration of other contributions." *Boonstra v Boonstra*, 209 Mich App 558, 562; 531 NW2d 777 (1995).

Precluding the trial court from considering pension benefits as part of the marital estate would restrict the trial court's ability to reach one of the primary objectives of any divorce proceeding: to arrive at a property settlement that is fair and equitable in light of all the circumstances. *Id*. at 563. Thus, the trial court did not abuse its discretion in distributing approximately half of defendant's pension to plaintiff.

Defendant next argues that the trial court erred in ordering that he begin making alimony payments before he reaches age fifty-five and before his pension reverts from disability to a regular service pension. Until then, defendant is unable to earn outside income and the trial court's allocation of income grants plaintiff more than twice defendant's income.

We conclude that the court issued plaintiff an alimony award only because the City of Saginaw would not honor an EDRO. See *Rangel, supra*. The alimony award was actually a means of effecting the property settlement. The judgment of divorce states that plaintiff "will begin collecting her payments when the Defendant *retires* or is considered permanently disabled . . ." (emphasis added). Because according to his employer defendant has already retired, the court did not err in ordering the payments to commence on May 28, 2001.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey